IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
APPELLATE SIDE.

CRIMINAL APPEAL NO. 747 OF 1996

Shabbir Abalal Mujawar ..... Appellant

versus

The State of Maharashtra ..... Respondents

.....

Mr. S.V. Marwadi for the appellant
Mrs. V.R. Bhonsale APP for State.

.....

CORAM: V.G. PALSHIKAR &
R.C. CHAVAN, JJ.

DATED : 20TH JULY, 2005

ORAL JUDGEMENT (Per Palshikar, J.) :

1. Being aggrieved by the judgment dated 9-12-1996 passed by the IVth Additional Sessions Judge, Kolhapur in Sessions Case No. 67 of 1995 appellant has preferred this appeal on the ground mentioned in the memo of appeal as also canvassed before us.

2. With the assistance of the learned advocate appearing on behalf of the appellant and the learned APP, we have srcutinised the entire record, and re-

appreciated the evidence both oral and documentary as is raised on the record before the Additional Sessions Judge.

3. The prosecution case is that at the relevant time, the complainant was residing in a house at ward no. 8 alongwith his daughter, Rehana and son, Riyaz and was selling tea on the cart. The appellant and other accused were residing nearby and the appellant was working on handloom machine. There was one water tap from which the other public as well as the complainant used to fetch the water. On 01-12-1994 the complainant left the house with his son, Riyaz and went to cart at 7.00 a.m.

4. It is the prosecution case that at 9.00 a.m. Rehana, the daughter of the complainant came and informed the complainant that on 1-12-1994 all the accused assaulted deceased Baby the wife of the complainant with kicks, fists and a knife. The complainant therefore rushed to the place and learnt that Baby had gone to water tap to wash bed clothes and at that time some altercation took place in which accused no.3 first assaulted the deceased and thereafter accused no.2 and the appellant hoined the said assault resulting in fatal injury to the deceased. He, therefore, removed the deceased wife to the hospital where on examination she was declared dead. The First informant, therefore went to the police station and lodged his complaint which was recorded as aforesaid.

5. On the basis of this FIR the accused persons were arrested and on completion of the investigation, they were tried in the Sessions case No. 67 of 1995 and the learned Judge has accepted the evidence and then proceeded to convict the original accused no.1 as mentioned above. It is this order of conviction of accused no.1 which is challenged in this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us. The basic contention of the learned advocate for the appellant is that most of the witnesses have turned hostile and therefore there is total failure on the part of the prosecution to prove its case and consequently the accused deserves to be acquitted.

6. The learned advocate for the appellant meticulously took us to the entire evidence and pointed out, what according to him amounts to be material contradictions or omissions. The prosecution has examined 12 witnesses to prove its case and it is true as submitted by the learned advocate that some of the witnesses have turned hostile. However, the prosecution story basically comes out from the narration of P.w. 2 Rahana, seizure of the clothes of accused which is proved by P.w. 6 Sonabai, the medical evidence given by P.w. 10 Dr. Ashok and the deposition of the investigating officer P.w. 12 Bhagwan R. Patil.

7. P.w. 2 Rehana is the daughter of the victim and was eye witness. She is

sought to be disbelieved on the ground that she was not present at all, and was shifted her residence to that of her grand mother. So this suggestion is stoutly denied by the witness. Apart from that even the father P.w. 1 though has turned hostile has stated that for several days the witness has shifted her residence. It is therefore nobody's case that at the time when the incident occurred, she was not residing with P.w. 1 and the deceased. There **is** nothing in her cross examination which would held against the prosecution case. She has given a very good and detailed description of what exactly transpired at the water tap in the morning of the faithful day i.e. 1-12-1994. The best way to appreciate the truthfulness of this witness is to note verbatim what has been stated by her, which is as follows:

> *" At about 8.30 a.m. My mother went to water tap in front of our house for washing bed sheet. My mother then started washing the bed sheets. From one water connection two taps were given. My mother was taking water from one tap and Rabiya was taking water from another water tap. As there was no force to water, my mother closed another tap. Then Rabiya Mujawar, accused no.3 again opened the said tap. My mother asked Rabiya to close the water tap as there was no force to the tap water. Then Rabiya pushed my mother. When this was going on, I was standing near the said tap. Then Rabiya started beating my mother. By hearing said noise Shabbir and Mubarak came near the said spot of incident, and they started beating my mother. I tried to intervene the incident by saying why they are beating my mother. Then they also beat me. My mother was lying on the ground and she*

was beaten. Then accused Shabbir went inside the house and came with the knife and then gave a blow of knife on the stomach just below the left side of the chest. Then I started shouting as I saw blood was coming from the wound sustained by my mother. As I shouted some persons were gathered. Then I ran towards tea-cart of my father to call him. My father was there. I informed him all the incident. Then myself and my father came running towards my house. My brother Rihaj also came following us. My mother was lying on the said spot near water tap."

8. It will be seen from the statement of this witness P.w. 2 that she was present at the time when the incident occurred. Her presence was natural. She speaks of her intervention which also is natural. Then she has stated that she immediately went to the father and told him about the assault and all of them came back. The narrative is natural. It certainly inspire confidence and we have no hesitation in holding, agreeing with the learned trial Judge that the testimony of this witness alone is sufficient to convict the accused.

9. Even if the corroboration is to be sought for this testimony of a trust worthy eye witness, it is available in the shape of evidence of P.w. 6 Sonabai, who has proved the seizure of the clothes of the accused which have blood stains. The narration of Sonabai apart from proving the seizure also is the substantial corroboration to what has been stated by P.w. 2 Rehana. This, in our opinion, is an intrinsic corroboration to the testimony of P.w. 2. In addition to this, there is

also the evidence of P.w. 12 investigating officer, who has categorically stated that he did record the statement of several witnesses including P.w. 1 and the witnesses have stated that the assault was committed by the present appellant. Merely because some of the witnesses have turned hostile, it cannot be said that the entire prosecution story must fail. It is an established position in law that an uncorroborated testimony of an eye witness is sufficient for conviction, if the testimony is such which inspires confidence and is genuinely accepted as truthful. We have already recorded our finding that it is truthful. That takes us to the other contention of the learned counsel made only as an alternative submission that assuming it to be a case of stabbing by the appellant, it is a case where the stab occurred in a moment of heat of anger which having been enraged by the fact that his sister was being troubled by the victim. The quarrel started when the victim closing the tap which was being used by the sister of accused no.1. Though the case is trifle tempersome and in the heat of anger accused stabbed the victim. The evidence of P.w. 10 Dr. Ashok proved that it is a case of singular stab. In our opinion, in such circumstances, offence of committing murder would be attributed to the accused . At the same time from the evidence of P.w. 2, P.w. 10 and P.w. 12 it is obvious that accused had the knowledge that such stab blow may cause death. In our opinion, therefore the offence committed by the accused is punishable under section 304-I IPC being culpable homicide not amounting to murder, the assault having been made circumstantially without pre mediation. It is therefore necessary that we partly

allow the appeal. In the result, the appeal succeeds and is partly allowed. The conviction and sentence under section 302 IPC is set aside. Instead the accused is convicted under section 304-II IPC and is sentenced to suffer imprisonment for a period of seven years. The accused would be entitled to statutory set off, he has one months time to surrender his bail. The bail bonds are canceled. If the accused does not surrender within one month, the District & Sessions Court, Kolhapur should take immediate steps to see that the accused is arrested to suffer imprisonment awarded by this court.

xxxxx